# *TD 2004/89 - Income tax: consolidation: for the condition outlined in subsection 707-328(4) of the Income Tax (Transitional Provisions) Act 1997 , are Subdivisions 170-A and 170-B of the Income Tax Assessment Act 1997 applied as if they had not been amended, by Schedule 3 to New Business Tax System (Consolidation) Act (No. 1) 2002 , to only provide for loss transfers involving an Australian branch of a foreign bank?*

# Taxation Determination

## Income tax: consolidation: for the condition outlined in subsection 707-328(4) of the *Income Tax (Transitional Provisions) Act 1997,* are Subdivisions 170-A and 170-B of the *Income Tax Assessment Act 1997* applied as if they had not been amended, by Schedule 3 to *New Business Tax System (Consolidation) Act (No. 1) 2002*, to only provide for loss transfers involving an Australian branch of a foreign bank?

***Preamble***

*The number, subject heading, date of effect and paragraphs 1 to 4 of this document are a 'public ruling' for the purposes of Part IVAAA of the* ***Taxation Administration Act 1953*** *and are legally binding on the Commissioner.*

1. Yes. For the condition outlined in subsection 707-328(4) of *the Income Tax (Transitional Provisions) Act 1997* ('IT(TP)A 1997'), Subdivisions 170-A and 170-B of the *Income Tax Assessment Act 1997* ('ITAA 1997') are applied as if they had not been amended, by Schedule 3 to *New Business Tax System (Consolidation) Act (No. 1) 2002* ('Act 68 of 2002'), to only allow for loss transfers involving an Australian branch of a foreign bank. The words, 'that neither of those Subdivisions had been amended to provide only for transfers involving an Australian branch (as defined in section 160ZZV of the *Income Tax Assessment Act 1936*) of a foreign bank', in subsection 707-328(4) of the IT(TP)A 1997 operate to ensure that the Subdivisions are applied as if they had not been amended by Schedule 3 to Act 68 of 2002.

2. Chapter 13 of the Explanatory Memorandum to the New Business Tax System (Consolidation) Bill (No. 1) 2002[1] discusses the measures in the Bill dealing with the removal and modification of 'grouping' provisions such as the Division 170 loss transfer rules as a consequence of the introduction of a consolidation regime. The changes to the loss transfer rules generally apply from 1 July 2003. However, loss transfers are retained for certain transfers between an Australian branch of a foreign bank and either a head company of a consolidated group (or MEC group) or a company that is not a member of a consolidatable group. The operation of subsection 707-328(4) of the IT(TP)A 1997 disregards the amendments made by Schedule 3 to Act 68 of 2002.

[1] Enacted as Act No. 68 of 2002.

3. As it is intended that the value donor rules can be satisfied, the provisions can not be interpreted in a way that makes satisfying the conditions an impossibility. Accordingly, it is appropriate to disregard the amendments in their entirety and not only that part of the amendments which provides that one of the companies must be an Australian branch of a foreign bank.

4. Therefore, for the purposes of subsections 707-325(2) and 707-327(3) of the IT(TP)A 1997, it is ***neither*** necessary for one of the companies to be an Australian branch of a foreign bank ***nor*** is it necessary for the other company to be the head company of a consolidated group (or MEC group) or not to be a member of a consolidatable group, in order for the conditions about Subdivisions 170-A or 170-B to be satisfied.

## Example

*5. Head Co (a company with a 30 June balance date) forms a consolidated group on 1 January 2004. Two of the subsidiary members of Head Co's group that become members of the group when it comes into existence are Loss Co and Donor Co.*

*6. Loss Co incurred a tax loss in the non-membership period 1 July 2003 to 31 December 2003[2] and this loss is transferred to Head Co under Subdivision 707-A of the ITAA 1997. Head Co chooses that Donor Co will be a value donor (and therefore an amount of Donor Co's modified market value[3] will be added to Loss Co's modified market value) in working out the available fraction[4] for the bundle of losses[5] transferred (under Subdivision 707-A of the ITAA 1997 to Head Co) from Loss Co.*

*7. In order for Donor Co to be chosen as a value donor, it must have been possible for Loss Co to transfer the tax loss to Donor Co under Subdivision 170-A of the ITAA 1997, for the period between 1 July 2003 and just after the joining time on 1 January 2004. This period is taken to be an income year for the purpose of applying the loss transfer rules in this Subdivision. In determining whether this condition is satisfied, subsection 707-328(4) of the IT(TP)A 1997 provides that in determining whether this transfer could have occurred, the amendments are taken not to have been made that restrict loss transfers to those made between an Australian branch of a foreign bank and either a head company of a consolidated group (or MEC group) or a company that is not a member of a consolidatable group.*

*8. If these amendments are disregarded, for the purpose of applying the value donor rules, the loss is taken not to be precluded from being transferred even though the loss transfer could not have actually been made because of the amendments made to the loss transfer rules.*

## Date of effect

7. This Determination applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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[2] These losses are taken to be losses made for an income year by subsection 701-30(8) of the ITAA 1997, for the purposes of transfer and utilisation.
[3] As defined in section 707-325 of the ITAA 1997.
[4] As defined in subsection 707-320(1) of the ITAA 1997.
[5] See section 707-315 of the ITAA 1997.

**Commissioner of Taxation**
22 December 2004

*Previous draft:*

TD 2004/D54

*Related Rulings/Determinations:*

TR 92/20

*Previous Rulings/Determinations:*

*Subject references:*

- available fraction
- bundle of losses
- consolidation – losses
- group company loss transfers
- utilise a loss
- value donor

*Legislative references:*

- ITAA 1936 160ZZV
- ITAA 1997 Div 170
- ITAA 1997 Subdiv 170-A
- ITAA 1997 Subdiv 170-B
- ITAA 1997 701-30(8)
- ITAA 1997 Subdiv 707-A
- ITAA 1997 707-315
- ITAA 1997 707-320(1)
- ITAA 1997 707-325
- IT(TP)A 1997 707-325(2)
- IT(TP)A 1997 707-327(3)
- IT(TP)A 1997 707-328(4)
- TAA 1953 Pt IVAAA
- New Business Tax System (Consolidation) Act (No 1) 2002 Sch 3

*Other references:*

- Explanatory Memorandum to the New Business Tax System (Consolidation) Bill (No. 1) 2002, Chapter 13

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